

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JANE DOE, : 15-MC-1174(JG)
Plaintiff, :
-against- : United States Courthouse
 : Brooklyn, New York

UNITED STATES OF AMERICA, : Monday, October 26, 2015
Defendant. : 10:00 a.m.
----- X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: GOLUB & GOLUB, LLP
Attorneys for the Plaintiff -
Jane Doe
225 Broadway
15th Floor
New York, New York 10007
BY: MITCHELL GOLUB, ESQ.

JONES DAY
Attorney's for Amicus Margaret Love
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
BY: PAUL LETTOW, ESQ.
LAWRENCE D. ROSENBERG, ESQ.

LAW OFFICE OF MARGARET LOVE
Amicus Curiae
15 Seventh Street, N.E.
Washington D.C. 20002
BY: MARGARET COLGATE LOVE, ESQ.

A P P E A R A N C E S: (Continued.)

ROBERT L. CAPERS, ESQ.
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
Attorney for the Defendant -
United States of America
271 Cadman Plaza East
Brooklyn, New York 11201
BY: DAVID K. KESSLER, ESQ.

Court Reporter: Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter
Telephone: (718) 613-2487
Facsimile: (718) 613-2694
E-mail: Anthony_Frisolone@nyed.uscourts.gov

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1 (In open court.)

2 COURTRoom DEPUTY: All rise. The United States
3 District Court for the Eastern District of New York is now in
4 session. The Honorable John Gleeson is now presiding.

5 (Honorable John Gleeson takes the bench.)

6 COURTRoom DEPUTY: Calling civil cause for oral
7 argument in Docket No. 15-MC-1174, *Jane Doe against United*
8 *States of America.*

9 Counsel, please note your appearances for the
10 record.

11 MR. GOLUB: For the plaintiff, Jane Doe, Golub &
12 Golub, LLP by Mitchell Golub.

13 Good morning, Your Honor.

14 MR. KESSLER: For the defendant, United States of
15 America, David Kessler.

16 Good morning, Your Honor.

17 MR. LETTOW: Paul Lettow of Jones Day, your Honor,
18 representing Amicus Margaret Love.

19 MS. LOVE: Margaret Love.

20 THE COURT: Okay. Do you want to be heard in
21 support of your motion, Mr. Golub?

22 MR. GOLUB: As a preliminary matter, your Honor, it
23 was based upon an earlier decision you made in another Jane
24 Doe versus United States of America that I brought this
25 petition on behalf of Ms. Doe here for an application for

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1 expungement.

2 And I what did, basically, was citing the language
3 and the reasoning that this court used in terms of
4 establishing its basis for jurisdiction and the basis for the
5 reasoning for the application, I thought that it applied in
6 the case of Ms. Doe.

7 I don't know if it was the same case of insurance
8 fraud, but it was certainly a similar one going back about
9 15 years that resulted in her sole connection with the
10 criminal justice system.

11 Ms. Doe was then, and is now, a Licensed Practical
12 Nurse, has worked for many years with many infirm people, many
13 people that were possibly, eventually, terminal, and has
14 performed a real public service. And she had worked in that
15 field for many years prior to her unfortunate involvement in
16 the insurance fraud case that resulted in a conviction here.

17 Your Honor had sentenced her to a 15-month sentence
18 and a number of years of supervised release afterwards and she
19 did that. As a result of the conviction, she had initially
20 her license suspended and she was placed on probation for a
21 number of years. And when that was all said and done, she was
22 attempting to get back into doing what she did before as a
23 Licensed Practical Nurse.

24 For a period of time, she had some success, and in
25 large measure, and I mentioned this in my reply brief, that

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1 was because of the fact that she had established working
2 relationships with some of the nursing companies that would
3 refer out.

4 Essentially, what we are talking about here are
5 mostly -- it's mostly private work, this isn't government work
6 or anything else like that. She basically has private
7 companies that would hire her, send her out to different
8 assignments, and that's significant from the standpoint of
9 what your Honor raised after I made the initial application
10 you're talking about a Certificate of Rehabilitation as a
11 possible alternative here as another measure.

12 And based upon my looking into the analogous
13 situation in New York with the Certificates of Relief From
14 Civil Disabilities and the Certificate of Rehabilitation, it
15 struck me that what that does is it may eliminate legal bars
16 to certain things, like, you were legally barred from applying
17 for a civil service job because of this conviction we remove
18 that. You were legally barred from voting or other things
19 like that, we'll remove those.

20 But from the point stand of somebody who's working
21 in the private sector, it doesn't really have the intended
22 effect. And what we're really talking about here --

23 THE COURT: How do we know that? I'm not suggesting
24 that I think you're wrong, but, I mean, how do we know?

25 MR. GOLUB: I think that common sense tells us that

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1 they'll look and they make a note that, well, she served her
2 sentence. She's out now, she's back here, she's been
3 reinstated. But, in the end, they're still going to look at
4 the same thing they looked at before and say, oh, convicted of
5 insurance fraud, healthcare fraud, and nothing is going to
6 change. It's basically the Court's printing a seal of
7 approval saying she's been rehabilitated and everything else.

8 For the private sector --

9 THE COURT: They don't care what judges say? I'm
10 not suggesting that's a preposterous notion.

11 MR. GOLUB: No, it doesn't seem they do and
12 everything else like that. It's one of things we look at, for
13 example, by analogy when people are told, for example, all
14 right, listen you have to have X amount of women business
15 owners or this or that or something else or else you're going
16 to lose federal funding and they do. And when they are
17 otherwise privately held they don't have to answer to anybody,
18 they don't.

19 I don't think it's any different in this situation
20 that if there is no consequence to them, and there really
21 isn't, the Court saying, well, shame on you for doing this,
22 there is no other consequence to them. There is this
23 collateral consequence unlike the collateral consequences that
24 Ms. Doe faces as a result of this conviction 15 years later.

25 THE COURT: Even if the relief you seek is granted,

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1 isn't there still going to be a record readily available to
2 her employers?

3 MR. GOLUB: I don't believe so because if the
4 conviction is expunged I think that as well the indication on
5 the license, and that was what I attached to my original
6 motion papers, that page from the web page where virtually
7 anybody can go to do their own check. There's two ways to go,
8 you do a criminal background check.

9 THE COURT: Who's in charge of that?

10 MR. GOLUB: That's New York State licensing.

11 THE COURT: They're not here. Can I properly enjoin
12 them?

13 MR. GOLUB: If there's no record of a conviction
14 expunged, I think there's a legitimate basis to go back and
15 say, listen, that conviction has been expunged. There is no
16 basis for to you have it on the license. They will look and
17 say, well, there is no record, run your criminal check, it's
18 not there. I think then there is a compelling basis for them
19 to change that and I think that's the best chance she has.

20 Anything short of that, I'm fearful that what you're
21 intending to do, which I think is correct and admirable, will
22 not have any opportunity of happening.

23 THE COURT: What is it that I'm intending to do?

24 MR. GOLUB: You're saying that you're trying to give
25 her an opportunity to put the perpetual punishment for this

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1 conviction for which she's paid her time, and the collateral
2 consequence of basically being rejected again and again for
3 future employment.

4 That's what I believe you're intending to do saying:
5 Enough is enough, she's been punished and she should be able
6 to get on with her life now. I think that the expungement
7 gives her the best chance of doing that.

8 THE COURT: Okay. Thank you.

9 MR. GOLUB: Okay.

10 THE COURT: Would you like to be heard.

11 MR. LETTOW: Your Honor, may I collect my materials
12 from the desk?

13 THE COURT: Yes.

14 MS. LOVE: I'm going to let my counsel say a word
15 first and then I'll add a bit.

16 THE COURT: Okay.

17 MR. LETTOW: Thank you, your Honor.

18 With the Court's permission, I could briefly address
19 a few of the issues that have arisen regarding audita querela.

20 First, we think this Court does have subject matter
21 jurisdiction to consider the petition for audita querela. In
22 Morgan, the Supreme Court construed the writ of coram nobis as
23 a step in the underlying criminal case rather than as a
24 separate proceeding. In audita querela, coram nobis, courts
25 have spoken at length.

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1 So Courts of Appeal have stated, or at least assumed
2 in some cases on the basis of Morgan, that audita querela
3 exists, too, in the post-conviction context. We don't think
4 Kokkonen applies in this context because of the material
5 differences. Kokkonen being a settlement in a civil case
6 where enforcing that settlement would have required a new
7 civil suit under state law, so we don't think Kokkonen applies
8 in this case.

9 Even if it does, we think the Court's consideration
10 of a Writ of Audita Querela would fit under either prong of
11 ancillary jurisdiction under Kokkonen first because of the
12 interdependence of the conviction and its ensuing
13 consequences, and then under its authority to vindicate its
14 authority and effectuate its decrees.

15 We think that the Second Circuit has never directly
16 addressed the question as to whether the Writ of Audita
17 Querela is available for purely equitable reasons. It is said
18 that it is available for legal reasons in certain limited
19 contexts.

20 And the Tenth Circuit, and some of the district
21 courts in the Tenth Circuit, including Villafranco a 2006 case
22 have gone back through the history and the case law and the
23 scholarship and determined that audita querela is, in fact,
24 available for equitable reasons. We would commend the
25 Villafranco case to the Court for that purpose. So we think

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1 it is available.

2 The other issue that we'd like to raise is even
3 under the definition that most circuit courts have held
4 applies in the case of *audita querela*, which is the legal
5 defense or discharge, we think that courts ought to be careful
6 not to too narrowly define the discharge.

7 Historically, of course, and for *audita querela* the
8 discharge meant that either the debt had been released or that
9 it had been paid, and we think that there can be cases where,
10 for example, if someone is unable to work productively and
11 provide for their family that that can be effectively a
12 discharge of the sentence that they have served and now
13 they're being sentenced to what is effectively a lifetime of
14 unemployment. And Judge Dearie, in his Stevenson expungement
15 opinion, I think addresses some of those questions.

16 Finally, briefly, in terms of this kind of
17 anticipating this "floodgates" argument. In the first case,
18 of course, if the Court were to grant a Writ of *Audita*
19 *Querela*, it would have be in the extreme or extraordinary
20 circumstances. And, historically, it would also have to take
21 into account the question of whether other remedies other
22 post-conviction remedies are available, so this is not a way
23 to circumvent, for example, §2255 or other statutory schemes.
24 And, furthermore, it would have to consider whether the
25 petitioner could have brought the basis for the petition

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1 earlier and then would have the balance the equities.

2 Finally, I'd just like to point out the Writ of
3 Audita Querela we think is authorized for this court and other
4 district courts. And because it's authorized, using it could
5 have the salutary effect; that is, the normal back and forth,
6 the normal constructive dialogue among the branches.

7 So, for example, if the court uses it in an
8 appropriate context, it could be a signal to the Legislative
9 Branch that law reform is necessary in this collateral
10 consequences context.

11 And the exemplar of this is the administration of
12 the pardon process in the 18th and 19th Centuries both in
13 England in the United States where judges routinely were
14 recommending to the executive that a pardon be granted
15 oftentimes for similar reasons here, and the Executive
16 regularly granted those pardons. And that process became so
17 overwhelming over time that it encouraged the legislature in
18 both countries to consider some of the overpenalization that
19 had been going on historically.

20 So we think that when used appropriately with the
21 Court's authority which we think it has to could be part of
22 that normal constructive ongoing dialogue.

23 THE COURT: Are the circumstances here sufficiently
24 extraordinary warrant at that relief in your view?

25 MR. LETTOW: Your Honor, I think Ms. Love may speak

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1 shortly, but I -- we're somewhat reluctant to weigh in on that
2 in part because I'm not sure we have the same information that
3 the Court and the parties have: Deposition transcripts, the
4 records, and so on. So we are reluctant to weigh in on that.

5 MS. LOVE: Thank you, your Honor.

6 Mr. Lettow is perfectly correct, we really don't
7 have the facts at our disposal to advise you in this
8 particular case. And it is a very fact-based determination
9 much like a pardon is a very fact-based determination.

10 I believe that it would be preferable to have
11 current legislation to authorize the courts to grant relief.
12 The states have been extremely active in trying to device
13 different kinds of legislative solutions. The law reform
14 organizations, most recently the American Law Institute, is
15 addressing this problem, and I don't think it's any accident
16 that in my most of the state legislation, and in the ALI
17 proposal like the Uniform Act, the courts are the ones that
18 are given the lead in addressing collateral consequences.

19 Unfortunately, in the federal sector, this wave of
20 reform appears to be slow in coming. The current sentencing
21 reform legislation pending in both the Senate and House that's
22 been billed as comprehensive really does not address this
23 problem except a tiny sliver of juvenile adjudications. And I
24 think that's a shame, and perhaps in the course of being
25 considered there will be other opportunities. For example, I

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1 saw that Judge Sullivan in Washington last week, in approving
2 a deferred prosecution agreement for a corporation, had a
3 great deal to say at the end of his opinion about why the
4 Justice Department does not accord the same consideration for
5 little people, for drug offenders, for small-time offenders.

6 States have authorized deferred adjudication for
7 courts. There is a very narrow federal statute that
8 authorizes that for drug possession, but that statute could be
9 broadened greatly.

10 Pending that attention, we were really quite pleased
11 to find what we believe is existing, if perhaps a brief
12 antique, legislative authority for a court to act in these
13 case and courts have acted in these cases. So with
14 jurisdiction, we believe that this is a very, very fine
15 opportunity for the courts to begin to speak to these problems
16 to hasten this process of reform.

17 And I really hope that the Justice Department will
18 get on board. They have had a great deal to say to the states
19 about how the states ought to deal with this problem, but they
20 have not, and as I suppose as alumnus of the Department for
21 many years, all I can think of is that if I were still there,
22 I would certainly be trying to deal creatively and positively
23 with this problem, with the law I had, as opposed to just
24 simply reflexively saying no to everything.

25 THE COURT: What would work best? There are private

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1 databases. There are interesting and difficult legal
2 questions that have to be resolved here. But being a
3 feet-on-the-ground type, what would actually work best to lift
4 the disability for someone like Jane Doe when it comes to
5 getting a job?

6 Does expunction actually work given how the
7 information tends to proliferate itself and end up elsewhere
8 other than just in the FBI records? Do these certificates of
9 relief from disabilities actually accomplish the goal in the
10 states?

11 Would one -- obviously, I asked Mr. Golub how he
12 knows to might not be that effectual here in this setting. My
13 interest beyond figuring out the difficult legal questions
14 that this application raises is very concrete. It's how to
15 help people who we want to be able to work. We don't want
16 them -- they don't want to be on public assistance, we don't
17 want them on public assistance. What can we do to get them
18 off of public assistance and onto somebody's payroll? What
19 form of relief would guest effectuate that intent assuming for
20 argument's sake that this request Jane Doe would be the
21 beneficiary of that intent.

22 MS. LOVE: I think there are three steps, your
23 Honor. The issue of mandatory legal sanctions, ineligibility,
24 inability to get through the door is a major problem in many
25 areas. Healthcare is one of them, as a matter of fact, where

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1 a person with a felony conviction is ineligible to even apply.

2 Now, that doesn't apply in this case, that's a
3 problem that is dealt with by the New York certificates. It
4 would be dealt with by the various law reform proposals that
5 are pending. It would be dealt with a pardon.

6 The second step is a certification of good conduct
7 that will be persuasive, that will protect an employer that
8 may be nervous about hiring someone. Frankly, I think the
9 employers that are unwilling are going to be the last ones
10 that are sort of reflexively, again, unwilling are going to
11 hard to reach, they will be the last ones to reach.

12 But the third step, I think, is a program of public
13 education. I've just come from a meeting of the Uniform Law
14 Commission trying to figure out how to deal with the problem
15 of criminal records and they want to try to develop a uniform
16 act and it's a major problem now. And even though most of the
17 conversation is about mass incarceration, I think mass
18 criminalization, mass conviction will be the next topic.

19 So it's hard, it's hard to deal with attitudes that
20 are risk averse and that find conviction a convenient sorting
21 mechanism. There are ways to try to soften this attitude.
22 There's this "ban the box" movement which is one small tool, I
23 think. I don't think "ban the box" would have helped either
24 of the Jane Does because they apparently had no problem
25 getting a job, at least in some cases, and then the record

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1 check came, then they were fired. That's seems to be part of
2 the pattern here. The more common pattern is when you apply
3 and send your résumé and check the box. There's no
4 consideration at all for that person.

5 So I think it's a difficult, difficult problem and
6 everybody has their part to play, but when I was Pardon
7 Attorney I always thought that a pardon was a ticket to a new
8 life. It was not only removing legal disabilities, it was a
9 certification of good character, and from a pretty important
10 place that would not put his name on something and vouch for a
11 person without pretty good evidence that they were worth it.

12 Unfortunately, the Pardon Program in the Department
13 has pretty much dried up, which is something that needs to be
14 attended to. But, in the meantime, I think the more comment
15 on these issues, the more attention to these issues, we very
16 much welcome the interest and involvement of the Judiciary.
17 It's time that this became a topic of conversation. It's time
18 that we began to move the other branches. And we, as I said,
19 we welcome whatever the courts can to do bring attention to
20 this whether it's the way Judge Sullivan commented or
21 Judge Dearie's opinion and your own actions, obviously, are
22 tremendously important and have been themselves the topic of
23 conversation throughout the country. So that's the kind of
24 conversation that we do need to get started and we may reach
25 the other branches and I hope we will.

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1 THE COURT: Focusing just on the relief that a court
2 can grant, obviously, the pardon power is in the Executive,
3 legislative power is in the Elected, in the other elected
4 branch, I can't do any of those. Is it more effective for
5 Jane Doe to, in terms of getting and keeping a job, to having
6 a conviction expunged, or is it more effective to have a
7 rubric pursuant to which a judge in an appropriate case can
8 issue a statement, a certificate, whether it's years after the
9 termination of probation or coextensive at the same time as
10 the termination of probation. The essence of which is a
11 statement to an employer that this person has rehabilitated
12 herself and the Court's judgment should not be barred from
13 employment because of the conviction.

14 I don't mean to suggest there aren't other
15 alternatives. What would be most efficacious and dissuading
16 an employer, either a future employer or a current employer,
17 who has just now learned of the conviction. What's the most
18 useful device to get the defendant and that person's employer
19 to keep her in that person's employ, or is there nothing a
20 judge can do that's going to have an attraction?

21 MS. LOVE: The debate between forgiving and
22 forgetting has been going on for 60 years, since the Model
23 Penal Code, the first Model Penal Code. The first Model Penal
24 Code chose the forgiving method a set aside. Expungement
25 appears to be the relief that most people want because they

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1 don't trust employers, they don't trust them to behave
2 reasonably; in fact, in some states, they're even trying to
3 get a pardon expunged, which seems rather to me pointless, and
4 certainly disrespectful to the Executive Branch.

5 THE COURT: Right.

6 MS. LOVE: But I'm not sure what the answer is.
7 Functionally, I've always thought that forgiving was a more
8 thorough remedy in the long run giving the community and the
9 person who has offended against its laws a chance to
10 reconcile. Perhaps that's overly optimistic. Functionally,
11 expungement in the states is of mixed usefulness. Generally,
12 it only applies to very level offenses, or nonconviction
13 offenses as in New York where nonconviction records are
14 automatically expunged.

15 THE COURT: Right.

16 MS. LOVE: I think that's a good thing.

17 I am being dragged by some of my colleagues toward a
18 better opinion of expungement, which I have not had in the
19 past, but I think the legislature will be very reluctant to
20 authorize expungement, whatever that means functionally for
21 felony offenses. They have been in the states. Unless the
22 states had an old expungement law which they had from the '70s
23 that was when they were doing all this legislation, and then
24 20 years intervened where we apparently forgot everything that
25 happened before.

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1 But, again, functionally, it's very hard to tell
2 whether you can literally get rid of a record. Whether you
3 can find somebody in Google, I can frequently find people in
4 Google if I'm looking for what they do, particularly if
5 they're serving a long sentence.

6 So it's difficult. I would prefer myself, to work
7 on the forgiveness model. A more transparent model where you
8 really sort of tried to urge the business community to come
9 around. I think the public education component of this is
10 enormously important. Ohio is a very interesting state where
11 their current governor, Governor Kasich has been most
12 interested in these issues, and he has spoken publicly. There
13 is certificate now in the courts in Ohio that he helped get
14 through.

15 And I think he said, I heard him speak one time
16 about how he had 5,000 trucks out there waiting for drivers,
17 and in Ohio a commercial driver's license was barred if you
18 had a felony conviction for anything not to do with driving.
19 Governor Kasich got behind a law to change that. So this is
20 the kind of involvement -- and there are other governors who
21 have been very active in this area.

22 But, again, the role of courts in this public
23 education program is perhaps limited and it's obviously
24 limited to the particular case before you, but it is -- I
25 think it can be tremendously effective, and if the Executive

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1 is reluctant to use the bully pulpit to talk about these
2 issues then someone has to.

3 THE COURT: Okay. Thank you.

4 Mr. Kessler.

5 MR. KESSLER: Thank you, your Honor.

6 I just want to touch on a couple of points that were
7 made by counsel for the petitioner and for the amicus curiae.

8 First, to amend or correct the record I think a
9 little bit.

10 Counsel for the petitioner, I think, in either reply
11 brief mentioned that it seems like the reason that the
12 petitioner was able to work from 2008 to 2011 was that she was
13 working for agencies that had employed her before, so there
14 was less of a check on her background, or she didn't need to
15 reapply for those jobs.

16 What the transcript shows is that that was true this
17 is Page 47 to 48. That was true for 2004 to 2006 before her
18 license was suspended, but that after 2007, I guess, between
19 2008 and 2011 when she began working again full time after
20 that suspension, there is certainly no evidence in the record
21 or at the deposition that those agencies, and the names are
22 different, were agencies for whom she'd worked before. So
23 that is a salient fact.

24 The Court asked whether, you know, New York State is
25 not a party here, so to what extent could an order from this

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1 court bind New York State. I think it is unlikely for
2 New York State to erase the reference to the felony conviction
3 on Ms. Doe's, sort of, nursing license record. But I think
4 there's no authority for the Court to be able to order
5 New York State to erase the record of the suspension itself
6 which is a New York proceeding under New York administrative
7 process.

8 And so, I'm not sure that even if the record were
9 scrubbed so that the basis for the suspension wasn't listed
10 that would go so far. And I will come back to what the I
11 think the Court might be able to do.

12 But just turning to the *audita querela* question for
13 a moment.

14 I've laid out in the Government's papers. I think
15 the law in the Second Circuit is pretty clear that there has
16 to be a legal defect before that writ can be considered and
17 that's the reason that after Morgan, you know, which I think
18 is the '50s.

19 Ever since then *coram nobis* and *audita querela* have
20 been considered by courts because that is consistent with
21 ancillary jurisdiction that all the other circuits have
22 interpreted, or many of the other circuits so far have
23 interpreted Kokkonen as laying out which is that there might
24 be jurisdiction to expunge or to address a conviction where
25 there's a legal defect or a legal problem in some way with the

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1 conviction.

2 But neither Morgan nor any other case of which I'm
3 aware that is the circuit law at this point says that there is
4 jurisdiction from some source other than, you know, the
5 ancillary jurisdiction to grant a Writ of Audita Querela and
6 we have gone through the jurisdictional question here.

7 So then just turning to the Court's question about
8 whether the circumstances here are extreme enough to warrant
9 issuing, I guess, either ordering expungement or issuing a
10 Writ of Audita Querela.

11 The Government's position is that they are not,
12 these are not the same circumstances as was before the Court
13 in the previous Jane Doe case for a number of reasons, but
14 sort of the two most salient ones are, first, at a minimum,
15 the record about the difficulty Doe has faced in getting and
16 keeping jobs because of her conviction is less clear in this
17 case; and, second, or perhaps more important, she's never been
18 truthful about her criminal record. And that appeared to be
19 something the Court took into consideration in the previous
20 case, certainly, those facts are different here.

21 And if extreme circumstances warranting expungement
22 were found here that would at some level license all
23 defendants, or all people with criminal convictions, to
24 voluntarily not check the box, to voluntarily not report their
25 status from day one because there wouldn't have been a

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1 consequence to that.

2 So finally, turning --

3 THE COURT: I'm sorry. What do you mean by that?

4 MR. GOLUB: Sure.

5 What the petitioner said she's done in this case is
6 she's never truthfully reported having a criminal conviction.
7 So she's basically expunged her own conviction as soon as she
8 got out of -- as soon as she stopped serving her sentence.

9 So if that the record of that over many years, that
10 being the not reporting a conviction, still warranted
11 expungement that would create a huge incentive for everyone
12 else with a criminal conviction as soon as they got out of
13 jail to stop reporting that conviction and whether or not,
14 ultimately, the right answer is that there should be
15 expungement or Certificates of Rehabilitation, or there should
16 be forgiveness or forgetting.

17 I think we can all agree there shouldn't be
18 forgiveness and forgetting immediately without some great
19 showing of whatever ultimately Congress says will be required
20 to expunge convictions.

21 THE COURT: What if she checks the box, does she get
22 jobs?

23 MR. GOLUB: The record is not clear in this case
24 because she's never checked the box. In New York State,
25 it's -- employers have to take into account whether a prior

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1 conviction relates to a current job in deciding whether or not
2 to hire somebody. There are these Certificates of
3 Rehabilitation that Ms. Doe was not given one, I don't know
4 why in this particular case. So I think on this record we
5 can't answer the question what would happen if this particular
6 petitioner had checked the box in every single case.

7 Certainly, I think that it's obvious that a
8 conviction may make finding jobs more difficult in some cases
9 at least but that's not something that warrants expungement.
10 The law is very clear that extreme circumstances are at a
11 minimum what's required.

12 So just turning finally to, you know, I think the
13 Court asked amicus curiae is expungement a better remedy
14 issuing some sort of certificate because the courts can't
15 pardon someone or pertaining to the law. It's the
16 Government's position that the Court can't expunge a petition
17 in these circumstances.

18 Certainly, the Court can do what Judge Dearie did in
19 the Stevenson case which amicus mentioned which is effectively
20 vouch for the petitioner in the opinion. So, certainly, that
21 is something a Court can do right now under the current law
22 with no changes.

23 I think amicus suggested a court can recommend a
24 pardon, I'm not sure I understand the logistics of that enough
25 to be able to comment on everything that would be involved in

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1 that, but I'm not really sure it's different than vouching for
2 someone that this person is reformed.

3 But, in this case, I think the record is not clear
4 on that. Even if there were a case where a Court didn't have
5 jurisdiction to expunge the conviction but did believe that
6 the petitioner was reformed.

7 THE COURT: So when you're not saying no, when
8 you're saying maybe, yes, in the right case, the yes takes the
9 form of an opinion that says -- what do you mean by vouch?
10 What does that mean?

11 MR. KESSLER: Sure. I'm hesitant to suggest to the
12 Court what it do.

13 What Judge Dearie did --

14 THE COURT: Don't be hesitant, this is your job.
15 DOJ is very much -- wouldn't know it from this case -- but DOJ
16 is, in the main, on the other side of this, helping people get
17 jobs. That's what reentry is all about. So don't be
18 hesitant, I think it's your job.

19 MR. KESSLER: So here's what Judge Dearie did.

20 Judge Dearie held that the law in the Second Circuit
21 is that expungement requires extreme circumstances. He didn't
22 address the jurisdictional question one way or another, and he
23 pointed out that under the facts of this Stevenson case, which
24 was a couple of weeks ago. If the petitioner had not shown
25 extreme or exceptional circumstances warranting expungement,

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1 but -- I forget exactly what the sentence said -- but he went
2 on to say, My hope is that this opinion will serve as an, I
3 don't know, an indication or a reference or some word like
4 that to potential employers that, in my opinion, the
5 petitioner is employable and completely reformed, has paid her
6 debt to society is an exemplary person.

7 I think there's no jurisdictional or statutory bar
8 that would prevent a Court from saying that.

9 THE COURT: Okay. Is that it? Anything might work
10 better? What about a Certificate of Rehabilitation? What
11 about something that the determination of probation
12 supervision that might, with the Government's assistance,
13 constitute a some value added to the defendant who has
14 successfully completed probation and seeking employment?

15 MR. KESSLER: So, with respect to the certificate of
16 rehabilitation, to use generic term for, you know, whether
17 it's the New York State Relief from Disabilities or some other
18 operative document that orders or affirms something, there is
19 no jurisdiction to issue such an order.

20 THE COURT: Why not?

21 MR. KESSLER: Because the courts have jurisdiction
22 only to the extent there's constitutional provision or statute
23 or ancillary jurisdiction.

24 THE COURT: Can I do a determination at the end of
25 probation period when I still have the case?

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1 MR. KESSLER: I think that's possible.

2 THE COURT: Okay?

3 MR. KESSLER: We haven't briefed that here. But,
4 certainly, courts have more jurisdiction over sentencing
5 considerations when a defendant is still --

6 THE COURT: Either I have it or I don't. I don't
7 think I can have partial subject matter jurisdiction.

8 Assume it's at the conclusion of a probationary
9 period. The probationer has distinguished herself in a manner
10 that, in the Court's view, renders her qualified for
11 employment notwithstanding the conviction.

12 Is there any impediment, legally or logically, to
13 the Court saying so in a document that the probationer can
14 take with her to a prospective employer, or hold in her hand
15 until the prospective employer raises the prior conviction.
16 Can I do that?

17 MR. KESSLER: I can't think off the top of my head
18 to a legal or logical bar to the Court issuing such a
19 statement. I think if the Court were to issue an order, you
20 know, that records be expunged, or an employer take certain
21 actions then there would be significant legal problems. There
22 would be separation of powers concerns that are implicated in
23 these cases. There might be, you know, personal jurisdiction
24 questions about -- or not personal jurisdiction -- but
25 New York State wouldn't be a party to the underlying criminal

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1 case. There would be legal difficulties in ordering New York
2 State to take certain actions.

3 So I think to the extent the Court would make
4 orders, or directives at the end of probation, I think there
5 still would be significant legal problems.

6 To the extent that the Court were issuing a
7 statement attesting in a, I guess, in some document attesting
8 to the reformation or the successful completion of probation,
9 I cannot, at the moment, think of a reason that could not be
10 done.

11 THE COURT: I wonder if you think it would be
12 helpful to you if your office aligns itself with the approach
13 of DOJ generally? Would it be helpful to you, in your efforts
14 to get people like Jane Doe employment? Other U.S. Attorneys
15 are approaching this differently. They're trying to get
16 people like her jobs.

17 MR. KESSLER: Well, your Honor.

18 THE COURT: So my question is: Do you think it
19 would be helpful to U.S. Attorneys, and to their reentry
20 coordinators, if, in an appropriate case, and obviously the
21 U.S. Attorney could weigh in on whether such a certificate
22 ought to be issued. You think it would be helpful in your
23 efforts to get people like her employment.

24 MR. KESSLER: It could be although now the probation
25 department is able to speak to that.

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1 But on the question of this office, this office is
2 supportive of the POP and SOS programs and other programs.

3 THE COURT: That's not a reentry program.

4 MR. KESSLER: I understand that, but the Office is
5 supportive of those perhaps, and it is the position of the
6 U.S. Attorney's Office, and really all the U.S. Attorney's
7 Offices that have argued the Kokkonen issue that there is no
8 jurisdiction to, you know, expunge criminal convictions.

9 So this office is not an outlying in taking that
10 position. But I think information from the Court would always
11 be helpful in helping reentry.

12 THE COURT: All right. Thank you.

13 MR. KESSLER: You're welcome.

14 THE COURT: Anything further from Jane Doe?

15 MR. GOLUB: Yes. Briefly, if I may.

16 You said at the beginning of your comments you say,
17 look, I'm looking for on-the-ground type of stuff here. And
18 just listening respectfully, a Jane Doe or somebody else going
19 to an employment saying, I have this decision by Judge Dearie
20 or elsewhere and, look, they say good things about me here.
21 This is a nice intellectual discussion but it's not real
22 world. It has virtually no impact.

23 These reentry programs that the Government talks
24 about here, what we're talking about mostly here are people
25 who never had specific employment skills who are now being

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1 trained, so you won't sell drugs anymore because we're giving
2 you real-life skills so you can actually get a real job which
3 is very different than here. This woman had, and continues to
4 have, professional skills.

5 And so, she doesn't need that type of retraining or
6 something else like that, and her track record, other than
7 this one incident, has shown that this was, for lack of a
8 better word, aberrational conduct. It's not who she is and
9 what she is doing. So it's a little bit of a different
10 situation than we have over there.

11 As far as what was said before that, you know,
12 New York State, you know, violations are automatically sealed
13 and misdemeanors can be sealed, felonies are rarely sealed.
14 What the real effect of that is that essentially in most
15 cases, that's the end of it, you know, it's done and
16 everything else and they can honestly say, yeah, I've never
17 been convicted and it has real impact.

18 In terms of Jane Doe here not truthfully putting,
19 yes, I have not been convicted, go ahead, deny me. Most
20 employers will not truthfully say what they're doing. They
21 won't give a reason. I was astounded when I reached out to a
22 couple of employers who had offered jobs and I actually got
23 back a letter, which is included in my motion papers, where an
24 employer actually said, listen, we hired her, you had the
25 whole thing there, she had plane tickets to go, and then we

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1 saw that and we withdrew it. And that's the rare exception, I
2 commended them for doing that, but that's not realistic.

3 And so, in her situation, to have gone out there and
4 say from the beginning, yes, I've been convicted of a crime,
5 it was healthcare fraud, but I really wasn't what I'm doing
6 here but it wasn't -- I mean it's over before it begins.

7 If we're talking about on-the-street reality and
8 everything else, I don't think that should be held against her
9 in considering the merits of whether or not. I think the fact
10 that just one or two of these people have honestly said,
11 listen, but for this, of course, we would have kept her but we
12 can't do that now, we're going to let her go.

13 I think that's the real situation. I think the
14 merits here warrant the Court's intervention, and for the
15 reasons I stated before, I believe that the best chance Jane
16 Doe has is the expungement and that she can contact the state
17 and say, listen, do a record check, it's not there anymore.

18 Maybe just maybe they will listen, no, you don't
19 have the authority to order them, we're ordering you by
20 removing from your website that she had a conviction. But if
21 they run their own record check and it's not there anymore she
22 at least has a chance of having to cleared; and so, I'm asking
23 the Court to do what you did in the earlier case and grant the
24 expungement.

25 THE COURT: Okay. Thank you.

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1 MR. GOLUB: Thank you.

2 MR. LETTOW: Your Honor, very briefly may I make a
3 comment?

4 The Tenth Circuit in Oliver I think clearly states
5 that audita querela is available for equitable reasons and
6 that's never been overruled. And according to Villafranco the
7 district court looked back at that history and said it is
8 available. We think that's important because the
9 Second Circuit has never directly addressed the question.

10 And the reason I say that is because, again, looking
11 at what constitutes whether for equitable reasons, or under
12 this discharge category, particularly, with someone who is in
13 a profession that is needed and particularly needed in
14 society, it could well be that the collateral consequences are
15 so severe that they impose a sentence beyond which, beyond the
16 sentence she's already served and that's been discharged.

17 Now, why I do say all this. I think audita querela,
18 I think, provides the Court wither authority to do a few
19 different things. The remedies could be, one, and we saw this
20 in Salgado in the other courts that use audita querela in the
21 '90s. In the most extreme cases to vacate or set aside the
22 conviction including for equitable purposes, and obviously,
23 that's one of the move drastic remedies, but I do think it's
24 available.

25 The other is, two, and you were asking about the

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1 effect that this Court would have on state bodies, I think
2 Mr. Kessler addressed this as well. But, at the least, if one
3 is talking about a federal consequence or a bar, then surely
4 as part of a writ under *audita querela* you could specifically
5 target that in the right case and I say, I direct that this
6 may not be applied to this person. Whether it's kind of
7 effectively, and as applied, constitutional challenge or just
8 equitable, you may apply it to this person. So I think in the
9 federal context you can do that.

10 The third possibility, which is, I think what we
11 spent the most of the time discussing is you could use *audita*
12 *querela* in an appropriate case to issue, let's say, call it a
13 Certificate of Rehabilitation that would have something of the
14 effect of Judge Dearie's opinion which would be, I find this
15 person to be rehabilitated based on the facts in this hearing
16 and, essentially, I encourage in this it would be state
17 authorities as private employers to use it for that effect.

18 So we think that *audita querela* is it is little used
19 but it is available both in the Tenth Circuit and here
20 potentially, and that it could provide a number of different
21 remedies.

22 THE COURT: Thank you.

23 MS. LOVE: I'd just like to add that I'm very --
24 apart from the possibility of a set aside in a particular
25 case. In some cases, in some states like Washington state,

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1 they have enacted the old Model Penal Code approach. They do
2 vacate convictions in certain cases and fairly routinely.

3 I'm very encouraged to hear this discussion about
4 the possibility of making a Certificate of Rehabilitation,
5 really a formal and recognized piece of a court's authority.
6 Whatever real effect it may have, if the Department recognizes
7 it, appreciates it, perhaps takes it under advisement in a
8 pardon context, I think that would be very perhaps a little
9 bit, I'm not even sure what the word is, without a specific
10 statute. But if the Court does this, and if the Department
11 enthusiastically embraces this, I think this could go a long
12 way and perhaps then encourage Congress to put this on a solid
13 statutory footing. And it might well look something like the
14 New Model Penal Code.

15 So I think that's a tremendously interesting and
16 exciting approach here that I've heard this morning. Glad to
17 hear the Government thinks it's possibly good idea.

18 THE COURT: Okay. Well thank you for your able --

19 MR. KESSLER: Your Honor, may I?

20 THE COURT: -- assistance.

21 MR. KESSLER: May I just say one more thing about
22 this?

23 THE COURT: Sure.

24 MR. KESSLER: I'm not sure what a Certificate of
25 Rehabilitation would look like, or if the Court could issue

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1 one. My only point before was that the Court is certainly
2 free in an opinion, or an order terminating supervision or
3 during probation to state its views about rehabilitation. So
4 I want that to be clear.

5 THE COURT: Okay. Thank you. Thank you for your
6 assistance to the Court, Ms. Love, and your colleague as well.
7 I'll take the application under advisement.

8 I did ask my law clerk to hand to you a copy of a
9 memorandum she wrote to me that addresses more generally
10 U.S. Attorney reentry efforts and I will upload it so the
11 record reflects what I've shared with counsel prior to the
12 argument.

13 But, in gross, what it memorializes is an approach
14 by the Department of Justice to the problem that this
15 particular petitioner, this Jane Doe, is facing that strikes
16 me as a little more enlightened than the one that this office
17 has taken in this case and in the prior Jane Doe case. And I
18 want you to share this with the U.S. Attorney, please, share
19 this memorandum.

20 There's a Smart on Crime Initiative that the
21 Department of Justice began a couple of years ago, and among
22 the five goals for reform identified in the report referenced
23 in this memorandum is a goal to bolster reentry efforts to
24 deter crime and to reduce recidivism.

25 The Attorney General, it was Attorney General Holder

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1 at the time instructed all federal prosecutors to factor
2 collateral consequences into their policies. And he noted
3 that one consideration could be time limits on certain
4 collateral consequences. And these collateral consequences
5 are obviously imposed by a huge patchwork of statutes and
6 regulations that operate to severely disable folks who have
7 served their sentences and served their supervision from --
8 kept them from getting employment.

9 And Attorney General Holder noted that it's
10 important to ensure that these former -- he referred to them
11 as formerly incarcerated individuals. I think the sentiment
12 applies to people who get probationary sentences as well. The
13 importance of not subjecting them to life-long penalties after
14 they have completed their terms of incarceration.

15 This toolkit, which is a Reentry Toolkit dated
16 March 2014 prepared by the Department of Justice, highlights
17 some of the, I think, admirable efforts that have been made
18 around the country by United States Attorney's.

19 The U.S. Attorney for the Southern District of
20 Alabama hosts an employment job fair program every year,
21 partners with the Mobile Chamber of Commerce to bring together
22 potential employers and formerly incarcerated folks; educate
23 former employers about tax credits that might be available if
24 they hire folks in the reentry setting.

25 The District of Columbia U.S. Attorney has an

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1 Employer Reentry Forum Program that educates business leaders
2 in the community about the importance of supporting people who
3 are returning from prison.

4 Paul Fishman, who is the U.S. Attorney across the
5 river, has spoken at a couple of "Prisoner Reentry: Breaking
6 the Cycle" conferences.

7 Among the things that occur at these conferences is
8 the U.S. Attorney staff, lawyers in the U.S. Attorney's Office
9 asking people who went to prison based on their own efforts
10 what they can to do help them get a job in the reentry
11 setting.

12 Before she became the Deputy Attorney General, Sally
13 Yates was the U.S. Attorney in the Northern District of
14 Georgia. She held a summit on reentry in partnership with the
15 Governor's Office of Transition Support and Reentry. The
16 purpose of the summit was to convene the business community,
17 U.S. Attorney's Office and formerly incarcerated people to
18 correct public misperception and dispel myths that affect
19 reentry prospects.

20 The current U.S. Attorney, her successor, continues
21 to partner with local organizations. An initiative to provide
22 training and assistance for defendants in the reentry setting.

23 In the Northern District of Oklahoma, the
24 U.S. Attorney launched a Fresh Start Reentry Program which
25 includes a resource fair; it seeks to partner with local

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1 businesses.

2 In the Smart on Crime Initiative, Attorney General
3 Holder casts reentry as a top priority throughout the country.
4 He promised to keep working closely with state leaders, agency
5 partners, federal interagency resource counsel, and the ABA to
6 engage in efforts to help people who are trying to reenter
7 after their convictions, help them succeed.

8 He said, "Ultimately, this is about much more than
9 fairness for those who are released from prison. It's a
10 matter of public safety and public good and it makes plain
11 economic sense. It's about who we are as a people."

12 That's from Attorney General Holder's remarks at the
13 ABA meeting of the House of Delegates back in August of 2013.

14 There's so much effort being expended by other
15 offices to get people like this Jane Doe and the other Jane
16 Doe who is referenced here in the arguments back into jobs.
17 It's incongruous to me that there seems to be so much effort
18 to be expended by this United States Attorney's Office to keep
19 them unemployed. There ought to be a more positive approach
20 to this issue.

21 Please share this memo with Mr. Capers.

22 MR. KESSLER: I will do that.

23 THE COURT: I'm going to take the motion under
24 advisement.

25 Thank you very much.

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1 MR. GOLUB: Thank you.

2 MR. KESSLER: Thank you.

3 MR. LETTOW: Thank you.

4 MS. LOVE: Thank you.

5 (WHEREUPON, this matter was adjourned.)

6

7 * * *

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9 CERTIFICATE OF REPORTER

10 I certify that the foregoing is a correct transcript of the
11 record of proceedings in the above-entitled matter.

12

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16 Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter

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